SUBURBAN CO. *v.* TURNER.

June 14, 1906.

[54 S. E. 29.]

1. Judgment — Conclusiveness — Persons Concluded — Persons Not Parties.—Certain real estate was devised to testator's son for life, remainder to his lawful issue, and in the event he died without lawful issue, to testator's heirs. Held, that a sale of the remainder in partition so far as it affected the rights of the issue of testator's son was void; such issue not having been joined in the partition suit.

2. Judgment — Conclusiveness—Consenting Parties.—Where property devised for life to testator's son, remainder to his lawful issue, and in default of issue to testator's heirs, was sold in a partition suit in which testator's heirs were parties and consented to the decree which confirmed the sale of the remainder as well as the life estate, such heirs were estopped to object that the sale was not valid as to them.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1181.]

Appeal from Circuit Court of City of Norfolk.

Suit by Turner M. Jackson, as administrator of William H. Turner, deceased, against the Suburban Company and others. From a decree in favor of complainants, defendants appeal. Modified.

Wm. W. Old & Son, John B. Jenkins, and *W. L. Williams,* for appellants.

Jas. E. Heath, R. C. Marshall, and *W. H. Sargeant, Jr.,* for appellees.

BUCHANAN, J. In the year 1867, D. C. Barraud, Sr., died in the city of Norfolk, leaving a will by which, among other things, he gave to his grandson D. C. Barraud, jr., a life estate in a farm containing 100 acres, known as "Barron's," with remainder to his lawful issue, if he should die leaving any, and if he should die without such issue, then the remainder was to pass, under the residuary clause of the will, to the persons named therein.

Upon the death of the testator, the life tenant took possession of the "Barron's farm" and subsequently incumbered his estate by deeds of trust and judgments.

In the year 1874, D. C. Barraud, Jr., and others united as complainants in a chancery suit against R. C. Marshall and others. The object of the suit, as stated in the bill, was "to construe the said will, to fix and determine the rights and interests of the various parties interested therein, to protect and provide for the annuities, and to make partition in kind of the real estate so devised by the said D. C. Barraud, deceased, to and among the parties entitled thereto, according to their respective shares and in-

terests, so that the part or share of your orator, the said D. C. Barraud, therein, may be set apart in kind if practicable and so far as practicable, and sold for the benefit of the creditors under the said deeds of trust and judgment creditors aforesaid."

In the year 1875, a decree was entered directing the sale of the "Barron's farm," remainder as well as the life estate. In the year 1878, a consent decree was entered confirming a private sale of the farm to William H. Turner. This decree also ascertained the remainder interest in the proceeds of that sale to be $1,150.10, and directed it to be deposited in the Citizens' Bank of Norfolk, bearing compound interest, to await the death of the life tenant; and, at the same term of the court, a final decree was entered striking the case from the docket.

In the year 1885, William H. Turner, the purchaser at the sale mentioned, died leaving a will by which he devised the "Barron's farm" to his son, Henry L. Turner, during his life, and the remainder in fee to his grandson, William H. Turner, Jr. In the year 1891, the said Henry L. Turner and William H. Turner, Jr., conveyed to the North East Norfolk Land Company the whole of the "Barron's farm" with covenants of general warranty, but, in the year 1894, the said land company reconveyed to Henry L. Turner for life, and the remainder in fee to William H. Turner, Jr., about 30 acres of the said farm. The residue of the "Barron's farm," about 70 acres, is now owned by, or is subject to the liens of, the appellants, except the Citizens' Bank of Norfolk.

In the year 1901, Henry L. Turner, the life tenant of the 30 acres of the "Barron's farm," and the heirs of the remainderman, William H. Turner, Jr., deceased, instituted a suit against the children of D. C. Barraud, Jr., to remove a cloud upon the title to the said 30 acres of land growing out of the claim of the children of the said D. C. Barraud, Jr., that they were not parties to nor bound by the decrees entered in the cause of Barraud et al. *v.* Marshall et al., heretofore referred to. Upon a hearing of the said cause of Turner et al. *v.* Barraud et al., the circuit court of the city of Norfolk held that the action of the court in selling the remainder interest of the children of D. C. Barraud in the "Barron's farm" was not binding upon them, and that the decrees and other proceedings in the cause of Barraud et al. *v.* Marshall et al., so far as they affect the rights of the said children in and to the land in controversy, were null and void. Upon appeal, that action of the circuit court was affirmed. The history of the case and the reasons for this court's decision are fully set out in the opinion of the court in the report of the case which is found in 102 Va. 324-338, 46 S. E. 318.

After the affirmance of the decree appealed from in that case, the personal representative of William H. Turner, deceased (the purchaser of the "Barron's farm" in the case of Barraud et al. *v.*

Marshall et al.) instituted his suit in the circuit court against the Citizens' Bank of the City of Norfolk and others, to compel that bank to pay or turn over to him the said sum of $1,150.10 (and its interest) deposited with that bank under decree of the court in the case of Barraud et al. *v.* Marshall et al., as above stated.

The ground upon which the complainant bases his right to maintain his suit to recover the said sum is, as stated in his bill, that inasmuch as the said William H. Turner, under the decrees in the said case of Barraud et al *v.* Marshall et al., acquired only an estate for and during the life of D. C. Barraud, Jr., in the "Barron's farm," a trust immediately arose to pay back to him the said sum of $1,150.10, and that in equity the same continued to be, and was at his death, the property of William H. Turner, and that the complainant, as his personal representative, is entitled to recover the same from the said Citizens' Bank of Norfolk, which is trustee for whoever might be entitled thereto; and that inasmuch as the suit of Barraud et al. *v.* Marshall et al., had been removed from the docket, it had become necessary for him to institute a new suit in order to recover the said sum.

At the instance of the Citizens' Bank (the stakeholder), all persons in interest were made parties to the suit, and, upon a hearing of the cause, the circuit court granted the relief prayed for in the bill. From that decree the Citizens' Bank and the parties who claim title to, or liens upon, the 70 acres of the "Barrons' farm" under Henry L. Turner and William H. Turner, Jr., devisees of Wm. H. Turner, Sr., obtained this appeal.

As above stated, D. C. Barraud, Sr., devised a life estate in the "Barron's farm" to D. C. Barraud, Jr., and the remainder to his lawful issue, and, in the event he died without lawful issue, to the testator's heirs, and the money representing the proceeds of that remainder interest was deposited in the Citizens' Bank of Norfolk carrying compound interest, for the benefit of such person or persons as may be entitled to the same under the will of D. C. Barraud, Sr., at the death of D. C. Barraud, Jr.

It was held in the case of Turner *v.* Barraud, 102 Va. 324, 46 S. E. 318, that the sale of the remainder, so far as it affected the rights of the issue of D. C. Barraud, Jr., was null and void as to the 30 acres of the "Barraud's farm" involved in that case. But the heirs of D. C. Barraud, Sr., were not parties to that suit. Neither were the alienees of Henry L. Turner and William H. Turner, Jr., the devisees of William H. Turner, Sr., the claimants of the 70 acres residue of the "Barron's farm," parties to it. The decree in that case cannot affect the rights of the parties to this suit who were not parties to that suit. But as the facts in this case are substantially the same as in that case, as to the validity of the sale of the remainder, so far as it affected the rights of the issue of D. C. Barraud, Jr., a like conclusion ought

to be reached in this case. Treating, however, the sale of the remainder in the "Barron's farm" in the case of Barraud et al. *v.* Marshall et al., as a nullity so far as it affected the rights of the issue of D. C. Barraud, Jr., it does not follow that it was a nullity as to the heirs of D. C. Barraud, Sr. They were parties to that suit and consented to the decree which confirmed the sale of the "Barron's farm," which included the remainder as well as the life estate. This being so, they would not be heard to object that the sale as to them was not valid and binding, and upon the death of D. C. Barraud, Jr., without issue, as it is possible, the heirs of D. C. Barraud, Sr., would be entitled to the fund deposited in the Citizens' Bank, and the title to the remainder interest in the "Barron's farm" would be perfected in those who have acquired the rights of William H. Turner, Sr., the purchaser in the case of Barraud et al. *v.* Turner et al. In that event the estate of William H. Turner, Sr., will not be entitled to the fund in bank, nor will the parties who claim under him. If it were paid to the personal representative of said Turner now, or to those who claim under him, he would be getting what he may not be entitled to, and the heirs of D. C. Barraud, Sr., might be deprived of what they might be entitled to. In either event injustice might be done. But if the money on deposit in bank is held until the death of D. C. Barraud, Jr., then and not till then will it be known with certainty to whom it should be paid.

This seems to us the only safe and proper course to pursue, and the circuit court should have so held and dismissed the bill of the personal representative of William H. Turner, Sr., deceased, without prejudice.

Note.

The ruling of the court in this case is clearly supported by the weight of authority. Equity will interpose to protect the interest of the remaindermen, and where that remainder is lost to the remainderman by sale or removal, it will order the owner of the life estate, or a stranger, to restore the value of the remainder.

A purchaser from the particular tenant in possession of a chattel, takes subject to the rights of the remainderman, though the deed of gift creating the estates be not recorded, unless he bought without notice, or unless the tenant has been in possession during three years. Rev. Code, p. 358, art. 2. Gibson *v.* Jayne, 37 Miss. 164.

Where A., the tenant for the life of another of certain slaves, removed the slaves to another state and sold nothing more than his own interest in them, it was held that B., the remainderman, could not maintain a suit in equity against A. therefor, unless the removal and sale were effected fraudulently, for the purpose of injuring B., and an injury actually resulted. Lee *v.* McBride, 41 N. C. 533.

Where one has a remainder in personal property which is sold by the life tenant, equity will require the purchaser to give security to protect the remainderman. Gill *v.* Tittle, 14 Ala. 528.

A remainderman cannot complain of a trespass upon the tenant for

life, unless such trespass in some way endangers his remaider. Land *v.* Cowan, 19 Ala. 297.

Slaves were bequeathed to a brother, but, if he died without issue, then to go to his sisters forever. He died without issue, having sold the entire estate in the slaves to defendant, who had knowledge of the sisters' contingent interest, and who, in the lifetime of the brother, removed them from the state and sold them for a higher price than they would have brought in the state. Held, that the sisters were entitled to a decree in equity for the actual value of the slaves before they were removed from the state. Sanderford *v.* Moore, 54 N. C. 206.

Where chattels were left to a married woman for life, then to her children, and her husband converted the chattels into money, the children may pursue the money in the husband's hands. Hunter *v.* Yarborough, 92 N. C. 68.

Estoppel.—The silence of a remainderman, after learning of a conveyance in trust for creditors by the person having the previous estate, is no estoppel to the assertion of his title. Inge *v.* Murphy, 10 Ala. 885.

WATKINS *v.* ROBERTSON *et al.*

June 14, 1906.

[54 S. E. 33.]

1. Evidence—Hearsay.—Where, in a suit to enforce specific performance of a contract for the sale of certain stock to E. and assigns, defendant R. claimed that he had sold the stock to his codefendant S., evidence of statements made by S. to defendant R. in the absence of both complainant and E. were inadmissible as hearsay.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1168.]

2. Same—Written Instruments—Contradiction by Parol.—Where a written agreement for the sale of stock provided for a transfer to E. or his assigns, parol evidence was inadmissible to show that the agreement was made for the purpose of authorizing E. to sell the stock to one S. only, at the specified price.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1787.]

3. Specific Performance—Irrevocable Covenant—Contract under Seal—Consideration.—Where a contract or option for the sale of certain stock at a specified price if accepted within a stated time was under seal and recited a consideration of $1 in hand paid, etc., it should be treated as an irrevocable covenant of which equity would enforce specific performance if accepted within the time specified.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 90, 178.]

4. Contracts—Seal—Consideration—Recital.—Where the owner of certain corporate stock executed an option under seal expressing a consideration of $1 by which he agreed to sell such stock for a